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In the Supreme Court

of the

United States

OCTOBER TERM, 1968

No. [redacted] 350

AGNES L. HAINES, as surviving spouse and personal representative of DONALD J. HAINES, deceased,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

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Petitioner, AGNES L. HAINES, prays that a Writ of Certiorari issue to review the denial by the Arizona Supreme Court of Petitioner's Petition for Review of the judgment of the Arizona Court of Appeals.

REPORTS OF OPINIONS

The opinion of the Arizona Court of Appeals is reported at 7 Ariz.App. 65 and 436 P.2d 159. The Supreme Court's denial of the Petition for Review is not reported. The

opinion of the Court of Appeals and the denial by the Arizona Supreme Court of the Petition for Review are set forth in Appendix "B" and Appendix "D," respectively.

JURISDICTION

The Judgment of the Arizona Court of Appeals, the intermediate appellate court in the State of Arizona, was entered on January 17, 1968, and the Petition for Rehearing was denied on March 21, 1968. The Supreme Court of Arizona denied the Petition for Review on April 30, 1968. Under relevant Arizona law the Judgment became final as a matter of State law upon the Supreme Court's denial of the Petition for Review. The jurisdiction in this Court is invoked under 62 Stat. 929, 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Sections 1 and 2 of the Federal Employer's Liability Act,[1] adopted in 1908, provide that employers under the Act shall be responsible for injuries "resulting in whole or in part from the negligence of" the employer. This Court held in *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500 (1957) that Congress intended by this Section to make the employer responsible where his negligence was the simple cause of injury to his employees, thus relieving the injured employee of the more exacting proof of proximate causation. The principal question presented in this case is whether Congress intended in Section 3 of the Federal Employer's Liability Act—which does not contain the qualifying lan-

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1. Section 1 deals with the liability of common carriers for negligent injuries to their employees while "engaging in commerce between any of the several States or Territories. . . ." Section 2 contains similar provisions pertaining to common carriers in "the Territory, the District of Columbia, the Panama Canal Zone, or other possessions of the United States. . . ."

guage "in whole or in part"—to make simple causation rather than proximate causation the standard applicable to the plaintiff's negligence.

2. Whether there was sufficient evidence upon which to charge the jury on the issue of decedant's negligence and the legal effects of such negligence.

3. Whether it was error to admit into evidence in this case a railroad safety rule.

STATUTES INVOLVED

The statutory provisions involved are Sections 1-5 of the Federal Employers' Liability Act, 45 U.S.C. sections 51-55. The relevant sections are appended to this Brief as Appendix "G".

STATEMENT OF THE CASE

This is a wrongful death action commenced pursuant to the Federal Employers' Liability Act (35 Stat. 65, as amended, 45 U.S.C. sec. 51 *et seq.*) for the death of a railroad employee, killed in the line of his duties as a conductor for a railroad engaged in interstate commerce as a common carrier.

Petitioner is the widow of the deceased railroad employee, Donald J. Haines. The decedent met his death on the night of November 12, 1964, as the result of the derailment of a Southern Pacific Company freight train near Bowie, Arizona. Mr. Haines was the conductor on this train and at the time of the derailment was acting in the course and scope of his employment with the Southern Pacific Company. This employee had 36 years of service with the railroad and was 56 years old when he was killed.

The derailment occurred on account of a failed rail. The circumstances why this rail failed and the conflicting testimony of experts on this phase of the case are eliminated

from this Petition as immaterial. Suffice it to say that the train involved was 89 cars long and that the last 12 cars including the caboose were derailed by the failed rail.

At the time of the accident Mr. Haines was in the caboose, the last car on the train. He was talking on the radio-telephone to a conductor on another train who was seeking train traffic information. Mr. Haines' train was traveling 60 miles per hour in rural country on straight (tangent) track. The derailment caused the train to come to an inordinately fast stop, which in some unknown fashion caused Mr. Haines to end up at the head end of the caboose where he apparently struck his head and was killed instantly or nearly so. It was stipulated that he was killed as a result of the derailment.

The exact position of Mr. Haines in the caboose at the time of the derailment is open to question, since no one saw him. It is not known whether he was seated or standing. If he was standing, it is not known whether or not he was holding an overhead grab iron or, if not, whether he was prepared to do so instantly. The two other employees riding with Mr. Haines, Hannah and Upshaw, had their backs to him, although they heard him talking on the radio. His body was found in the front of the caboose after the train came to a stop and the other caboose passengers turned on the light and became oriented as to what had happened.

Because of the construction of the caboose and the location of the radio-telephone, it would have been necessary for Mr. Haines to get out of the seat he was occupying to reach the telephone receiver in order to relay the information requested by the other conductor.

At the trial of the case, the Court admitted in evidence, over Petitioner's objection, defendant's Safety Rule No. 2044 (R.T. 111-114). The portion of the Safety Rule admitted is as follows:

> "At all times when riding moving equipment, employees must be prepared for sudden or unexpected

starting, stopping, lurch or jerk of engine, car, or train by maintaining firm hand and foothold, by being braced and holding, or prepared to do so instantly, moving about only when necessary for the performance of duties."

The trial court refused to permit the plaintiff to show that the foregoing safety rule was customarily violated. (R. T. 108-109).

At the close of all the evidence, the Court instructed the jury upon the definition of proximate cause, decedent's negligence, sole proximate cause, contributory negligence, and reduction of plaintiff's award. The instructions are set forth in full as Appendix "F".

Petitioner objected to Respondent's Requested Instructions 6, 7, 8, 9, and 10 on the ground that there was not sufficient evidence of contributory negligence to submit the issue to the jury (R.T. 479), and on the ground that under the Federal Employers' Liability Act, a plaintiff's award can be reduced only by that negligence of the decendent which was a proximate cause of the death and not that negligence which might merely be the simple cause (R.T. 409, 480).

The trial court in Arizona, the Superior Court, indicated that it understood and rejected Petitioner's contentions and overruled the objections (R.T. 402-3).

Petitioner appealed the judgment of the Superior Court to the Arizona Court of Appeals, which affirmed the judgment. Petitioner moved for rehearing of the appeal, one ground of which was that the opinion of the Court of Appeals misstated the facts. The Court of Appeals had adopted defendant-appellee's Statement of Facts, including contentions unsupported by the record. The Motion for Rehearing was denied, and the Supreme Court of Arizona denied plaintiff-appellant's Petition for Review. This Petition followed.

REASONS FOR GRANTING THE WRIT

The principal issue in this case—whether the causation standard applicable to employee negligence in Federal Employers' Liability Act cases is the common law proximate cause, or simple cause such as is applicable to the defendant's negligence under the Act—is of central importance to the rights of plaintiffs under an important Federal statute. It is a recurring problem upon which there is a conflict of authority between, on the one hand, the Texas Court of Civil Appeals, and, on the other, the Fifth and Sixth Circuit Courts of Appeals and the Supreme Court of Oregon.[2]

The defendant's requested Instructions Nos. 6 and 7, both of which were given by the trial court, and to both of which the plaintiff objected are as follows:

DEFENDANT'S REQUESTED INSTRUCTION NO. 6

It was the continuing duty of the deceased to exercise ordinary care for his own safety. If he failed in

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2. *Missouri-Kansas-Texas R.R. v. Shelton*, 383 S.W. 2d 842 (Tex.Civ.App. 1964) cert. denied, 382 U.S. 845 (1965); *Page v. St. Louis, S.W. Ry.*, 349 F.2d 820 (5th Cir. 1965); *Ganotis v. New York Cent. R.R.*, 342 F.2d 767 (6th Cir. 1965); *Caplinger v. Northern Pacific Terminal*, 418 P.2d 34 (Ore. 1966).

The Fifth Circuit Court of Appeals in the *Page* case acknowledged the conflict:

> Attesting again to the marvels of an advocative system which, grinding out the thousands of FELA cases in State and Federal appellate courts, nevertheless after a half century's experience under the Act still leaves new questions, this problem is very, very fresh, the materials of decision are scarce, and the score now stands 1 to 1. Texas upholds the Employee's contention, the Sixth Circuit, that asserted here by the Railroad.
>
> 349 F.2d at 823.

Actually, the score is 3 to 2: the Fifth and the Sixth Circuits and the Supreme Court of Oregon on one side and the language of the Act and the Texas Court of Civil Appeals on the other.

such duty, he himself was negligent. If his negligence was the sole proximate cause of his injury, then the plaintiff may not recover.

If his conduct amounted to contributory negligence as to the death, and if you should find that the defendant is liable for the death, then in fixing the damages to be awarded the plaintiff, a proportionate reduction must be made because of such contributory negligence in accordance with these instructions.

DEFENDANT'S
REQUESTED INSTRUCTION NO. 7

A person is guilty of contributory negligence if he himself is negligent, and his negligence concurring with the negligence of another or of others, contributes in any degree, no matter how small, in proximately causing the death.

The plaintiff made specific objection to Instruction No. 7 on the ground that the causation standard applicable to plaintiffs under the Federal Employers' Liability Act was not the same as the standard for defendant's negligence. The error in the lower court's overruling this objection can be best appreciated against the background of a brief history of the Federal Employers' Liability Act, and the history of litigation in this Court relating to pertinent causation standards.

Under the Federal Employers' Liability Act, an employer is liable for an employee's injury if the employer was negligent, if the negligence was the simple cause of the accident, and if the plaintiff was damaged. The FELA abolishes the defenses of assumption of risk (45 U.S.C. Sec. 54) and contributory negligence (45 U.S.C. Sec. 53). In place of contributory negligence, Section 3 of the Act provides that the plaintiff's award shall be reduced by the amount of negligence attributable to the injured employee. (45 U.S.C. Sec. 53)

There was some confusion in the early cases concerning the causation standard applicable to employer negligence. Compare *New York Cent. R.R. v. Ambrose*, 280 U.S. 486 (1930) with *Schulz v. Pennsylvania R.R.*, 350 U.S. 523 (1956); *Ellis v. Union Pack R.R.* 329 U.S. 649 (1937); and *Wilkerson v. McCarthy*, 336 U.S. 53 (1949). However, whatever ambiguity may have existed prior to 1957, this Court held in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. (1957) that simple causation is the legal cause test for the employer's primary negligence.

Since the *Rogers* decision there has been a division among the lower courts as to whether proximate causation or simple causation is the appropriate standard for employee negligence. Two Circuit Courts of Appeals, the Fifth, *Page v. St. Louis, S.W. Ry.*, 349 F.2d 820 (5th Cir. 1965) and the Sixth, *Ganotis v. New York Cent. R.R.*, 342 F.2d 767 (6th Cir. 1965) have ruled that the Act requires simple causation for both employer and employee negligence. *Caplinger v. Northern Pacific Terminal*, 418 P.2d 34 (Ore. 1966) merely follows the Fifth Circuit. The Texas Court of Appeals in *Missouri-Kansas-Texas R.R. v. Shelton*, 383 S.W. 2d 842 (Tex.Civ.App. 1964) cert. denied, 382 U.S. 845 (1965) has reached a contra conclusion.

The reasoning of the Fifth Circuit Court of Appeals' opinion in the *Page* case is that a single standard is simple in application, and easier for the jury to understand. While we disagree with this conclusion, its chief defect is its irrelevance. The pertinent issue is congressional intent. The holding of the Court in *Rogers* was bottomed upon two considerations: (1) the language of Sections 1 and 2, making employers liable for damages "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . .," and (2) the general congres-

sional intent to expand the employee's right of recovery under the Act. In the language of the Court:

> "The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence. (Emphasis in the Court's opinion.)
>
> "The law was enacted because Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for all practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." 352 U.S. at 507-8.

Both of the foregoing considerations—specific qualifying language in Sections 1 and 2, and intent to benefit employees—militate in favor of the proximate cause standard as applied to employees. Section 3, unlike Sections 1 and 2, is not limited by the "in whole or in part" language which the Court found significant in *Rogers*. And it is hardly likely that Congress, in enacting a statute whose basic objective was to facilitate employee recover, would have imposed upon employees a causation test more onerous to the employee than the common law test. Congress should not be taken to have so intended, in the absence of particularized language in Section 3 such as appears in Sections 1 and 2.

Finally, as the Texas Court of Civil Appeals observed in *Missouri-Kansas-Texas R.R. Co. v. Shelton*, 333 S.W.2d 842 (1964), where there is no evidence of intent to alter the common law, as there was in the primary negligence context, the common law must be held to continue to apply.

It cannot be disputed that the question of the proper causation standard for employee negligence under the FELA is an important question. The divergence of opinion among the lower courts heightens the necessity of a resolution of this issue by this Court.

Corollaries of the rule adopted by the lower court that simple cause is the legal test for employee negligence are also found in other instructions. Instruction No. 8 instructed the jury to "Determine the total amount of damages to which the plaintiff would be entitled under the Court's instructions if decedent had not been guilty of contributory negligence." Upon analysis, the error in this instruction is inextricably interrelated with the error as to causation, and the one follows logically from the other.

In every case of contributory negligence on the part of the decedent, even where a jury might find that decedent's contribution was but one per cent, the jury would have to find that the injury or death would not have occurred were it not for that contribution.

But the test is not whether an injury would have occurred or to what extent it would have occurred in the absence of contributory negligence; rather, the jury should be instructed to determine how much of the injury was *caused* by the employee's negligence and then reduce the award by that percentage. The difference is devastating. Notwithstanding the fact that the death *would not have occurred absent the negligence of decedent,* the jury should assign a percentage to decedent's contribution.

The Arizona Court of Appeals erred in ruling that the causation issue is not presented by the instant case. The Court of Appeals ruled that in light of the jury's verdict for

the defendant, the jury must have either found that the defendant was not negligent or that the plaintiff's negligence was the sole proximate cause of the plaintiff's damages, and that "if any error in the instructions on contributory negligence, as to a single or double standard as argued by the plaintiff, existed it could only be harmless error in light of the jury's verdict for the defendant." 436 P.2d at 166.

The argument is fallacious, since the error in instructions as to the causation standard and the instructions on reduction of the award may very well have constituted the reason for the defense verdict.

The jury may have decided that defendant was negligent and that defendant's negligence was the simple cause of the death. However, the jury may have then decided that decedent's conduct caused his death in whole or in part. In reducing the award the jury must have considered the question raised by Instruction Nos. 8, 9 and 10 i.e., "Determine the total amount of damages to which the plaintiff would be entitled under the Court's instructions if decedent had not been guilty of contributory negligence." The jury probably concluded that had decedent not been guilty of contributory negligence there would have been no death at all and damages in the absence of contributory negligence would therefore be zero.

Defendant argued to the jury, "I think that you have to review all of the evidence and I think you will find this accident would not have occurred, nor would Mr. Haines have been injured or died had he taken only the slightest precaution for himself, . . ." (R.T. 445).

The harmless error argument is based upon the premise that under the FELA plaintiff's award is merely reduced by contributory negligence. However, the argument is unsound

because in this instance the jury was instructed to decide what damage would have been done in the absence of contributory negligence; the jury was compelled to find such hypothetical damage to be zero.

SUFFICIENCY OF EVIDENCE OF PETITIONER'S NEGLIGENCE

In the absence of any evidence whatever of negligence on the part of Conductor Haines, the trial court instructed the jury on the effects of contributory negligence and reduction of plaintiff's award. In addition to raising important questions of Federal law, the error is in conflict with prior decisions of this Court.

The sum total of all evidence of contributory negligence is as follows:

1. Conductor Haines stood to answer the radio-telephone.

2. It is unknown whether he was then seated, whether he remained standing and, if so, whether or not he held the overhead grab iron or was immediately prepared to do so.

3. Two to three minutes after he first answered the radio telephone a derailment occurred.

4. After the derailment, Hannah and Upshaw, who were in totally different positions in the caboose, were uninjured.

5. Conductor Haines was found dead at the front end of the caboose.

The foregoing is *all* of the evidence of contributory negligence. The opinion of the Arizona Court of Appeals cites additional purported facts, but these assertions of additional purported facts were simply borrowed verbatim from the Appellee's Brief, and are without any support in the record.

The additional purported facts referred to in the Court of Appeals opinion are as follows:

1. "The conductor's chair on the North side of the caboose immediately behind the north bay window was not occupied." 436 P.2d at 162, opinion page 3 (Appendix "B").

2. "However, the decedent chose to stand in the aisle two or three minutes during the conversation and while viewing the north leg of the Y." 436 P.2d at 162, opinion, page 3.

There is no support in the record for either of these statements. Neither is a statement of fact; both are conclusions which under applicable decisions of this Court are impermissible.

The entire basis for submission to the jury of the contributory negligence issue was an attempted inference from the conductor's death that he must not have been seated and that he must not have been holding the overhead grab iron.

> "There is no direct evidence whether the decedent was standing at the time of the derailment or whether he was securing himself by grasping the overhead grab-iron while standing in the aisle." 436 P.2d at 162, opinion page 3.
>
> "Now no one testified as to whether he was exactly, whether he had hold of anything or not. That is true. The testimony was that he was standing in the middle of the aisle. That is all the testimony." (From defendant's closing argument R.T. 446).

Besides allowing the jury to speculate on Conductor Haines' conduct, submission of the issue to the jury is in conflict with two decisions of this Court, *Jesionowski v. Boston & M. R. Co.*, 329 U.S. 452 (1947) and *Tillar v. Atlantic Coastline R. Co.*, 318 U.S. 54 (1943).

The opinion in *Jesionowski* observes that "Derailments are extraordinary, not usual, happenings." 329 U.S. at 458. It follows that no person can be held to have a duty to anticipate a derailment. Therefore, the contributory negli-

gence issue should not have been submitted to the jury, in light of *Jesionowski*. Conductor Haines' alleged contributory negligence is predicated upon his failure to protect himself against the consequences of a derailment. Not having any such duty, he cannot as a matter of law be contributorily negligent.

In the absence of a common law duty, the trial court, over plaintiff's objection, admitted into evidence the railroad's safety rule no. 2044.

> "At all times when riding moving equipment employees must be prepared for sudden or unexpected starting, stopping, lurch or jerk of engine, car, or train by maintaining firm hand and foothold, by being braced and holding, or prepared to do so instantly, moving about only when necessary for the performance of duties."

The trial court compounded the error by refusing to allow plaintiff to prove that the rule was customarily violated. (R.T. 108, 109) In the absence of evidence of violation of the rule, admission of the rule in evidence is equivalent to submission of the issue of assumption of risk.

In *Tillar*, this Court held that assumption of risk has been obliterated by the FELA in every form including the guise of contributory negligence and "no duty" on the part of the employer.

If Conductor Haines could have violated the rule by virtue of nothing more than his death, then in every instance where an employee who is killed in this manner, he would be guilty of contributory negligence for his violation of the safety rule. Adherence to the safety rule being a condition of employment, the lower court simply introduced into the case the doctrine of assumption of risk under the guise of contributory negligence.

CONCLUSION

For some fifty (50) years after the adoption of the Federal Employers' Liability Act it was not clear whether the legal cause standard applicable to employers' primary negligence in FELA cases was common law proximate causation or simple causation. Confusion in this area was resolved by this Court's decision in *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500 (1957). Of no lesser importance to the administration of the FELA by lower state and Federal courts is the question of the legal cause standard applicable to employee negligence under Section 3 of the Act. It is an issue on which there is a conflict among the lower courts and an issue which should be resolved by this Court.

It is respectfully submitted that the Petition for a Writ of Certiorari to Review the Judgment of the Arizona Supreme Court denying the Petition for Review and the Judgment on the merits of the Arizona Court of Appeals should be granted.

Respectfully submitted this 29th day of July, 1968.

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